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In the Supreme Court of the United States

October Term, 1979

In re:

MULTI-PIECE RIM PRODUCTS LIABILITY LITIGATION

THE FIRESTONE TIRE & RUBBER COMPANY,
Petitioner,

vs.

JOHN C. RISJORD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT RISJORD

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QUESTIONS PRESENTED FOR REVIEW

1. As stated under Question one in brief of Petitioner Firestone. (See Point I)

2. Should this court reconsider factual and discretionary findings related to claimed conflicts of interest already ruled by the District Court and Court of Appeals? (See Point II)

3. Should this Court in the first instance disqualify attorney Risjord where the District Court's ruling applying DR5-105 was proper and evidences no abuse of discretion and in light of the fact that since that ruling Risjord no longer represents clients with potentially conflicting interests? (See Point III)

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STATEMENT OF THE CASE

The statement of the case in Firestone's brief is argumentative and omits significant facts.

We refer to Petitioner as Firestone and Respondent as Risjord.

Risjord has handled one case for Home Insurance Company in the last ten years, the *Cannova* lawsuit, and his office handled a minimal number (A94, A98). Risjord withdrew from representation of Home in *Cannova* on November 7, 1979 at the direction of Home, and has not since represented Home. (A188, A191-2). The *Cannova* case was disposed of completely and dismissed with prejudice May 23, 1980 (Supp. Rec. Ex. C, 1).

Home Insurance Company is the insurer of Firestone under an excess policy in amounts in excess of either $50,000 (A150) or possibly $500,000 (A135). Under this policy Home does not have charge of the settlement or defense of claims, but has the right to associate with Firestone in defense and control of claims reasonably likely to involve Home (A234).

Risjord represents plaintiffs that have brought suit against Firestone. Risjord was selected as liaison counsel and lead counsel for plaintiffs in this multi-district litigation, which was approved by Judge Collinson in the first pre-trial order of March 29, 1979 (A81).

The Risjord complaints against Firestone contain essentially identical allegations. All allege claims based on defective products (A13, A29, A51, A63). The complaints allege that Firestone and in some cases, Goodyear, Kelsey Hays and Budd (A12, A50, A62), negligently, willfully, or intentionally committed some ten failures (paragraphs a through i and k) or deliberately withheld information

or misrepresented facts (paragraphs j and l, A15-16, A30-32, A52-53, A63-65). Count II alleges fraudulent misrepresentations in several numbered paragraphs (paragraphs 7 through 18, A19-23, paragraphs 3 through 15, A33-38, paragraphs 3 through 15, A43-48, paragraphs 8 through 17, A56-60, paragraphs 7 through 16, A67-71). The complaints seek actual and punitive damages (A23, A32, A38, A43, A49, A54, A61, A66, A72). In the Rodriquez case, another count is based on negligence and defective products (A26).

Risjord has filed complaints on behalf of a plaintiff against Goodyear Tire & Rubber Company, alleging identical claims (A205, A216).

In three of the Risjord cases, Goodwin, Butler and Rodriquez, Home Insurance Company wrote Firestone calling attention to the complaint allegations that Firestone "negligently, willfully or intentionally failed to recall, develop or redesign its steel rims." Firestone was told that any damages awarded in connection with willful or intentional acts would not be covered by the policy, reserving rights as to compensatory damages and denying coverage as to punitive damages (A113-116, A198-199). Home does not provide coverage in the Hale case (Br. 2, Note 3).

Letters with relation to five unrelated lawsuits have denied coverage for allegations of intentional acts or misrepresentations, willful acts or intentional concealment (A117-123).

Risjord has furnished no information on the hazards of multi-piece rims to Home Insurance Company (A95). Home has furnished no information to Risjord on these cases (A171, A192).

Risjord described his relation with Home Insurance Company. He understood that Home Insurance Company

was a fire company and he represented this company as long as he practiced law. He distinguished this from the Home Indemnity Company which wrote casualty business and he last did work of this kind in his early years of practice, 19 or 20 years ago (A91, A97). He knows nothing about the way Home Insurance Company undertakes to represent its policyholders in litigation, and in the last 19 or 20 years does not have any recollection of defending any Home Insurance Company insured. It is possible that his law firm has but he is not aware of it (A95, A99). He has had a number of such cases against Home insureds (A97).

Risjord was totally unaware that Firestone Tire & Rubber Company was ever insured or reinsured by Home Insurance Company, and he has no recollection of ever doing anything on behalf of any insurer for the Firestone Tire & Rubber Company or any subsidiary or affiliated company (A95). He does not know what connection Firestone Tire & Rubber Company has with Home (A98).

Home Insurance Company is the first-named representative insurance client in the Martindale-Hubbell Directory listing for Risjord's firm (A90). Risjord states that the order in which the clients are listed is not indicative of anything except that Martindale-Hubbell cannot alphabetize. He has written on proofs suggesting the list be alphabetized but this has not been done (A96). After making these suggestions, he gave up on it (A97).

Stock insurance companies habitually split the fire risks and the lead company hires counsel. This is the way he came to represent Home in the *Cannova* case (A98). General Adjustment Bureau hired him. Home had no choice but to accept Risjord's defense of Home's 10% interest in that dispute (A191, A171).

The *Cannova* litigation resulted in a claim for libel being asserted against Risjord as a defendant, and Mr. William Sanders, counsel for Firestone taking the deposition of Risjord, was employed to defend Risjord in that action (A92, A93). Sanders represented Risjord four years ago and knew of his representation of Home (A94).

District Judge William Collinson took up the motion to disqualify Risjord at a pre-trial conference August 10, 1979 (A148-149). He obtained stipulations that for the most part are incorporated in the formal findings. In addition, Risjord stressed that he represented the fire insurance company and not the liability insurer (A151). Home was under no obligation to employ his firm and never, to his knowledge, had it been employed in any liability or casualty type case. Home has other counsel in Kansas City in those cases (A152-153). Risjord and his firm have never represented Home Insurance Company in any subject matter related to litigation, and it never represented Firestone Tire & Rubber Company as their insured by Home (A154).

The trial court made the following findings of fact in the second pre-trial order of August 10, 1979 (A157-158):

1. For the past several years, and until the present time, Mr. Risjord's law firm has included Home Insurance Company in its list of clients published in the Martindale-Hubbell Law Directory;

2. During the past several years Mr. Risjord's law firm has represented Home Insurance Company in litigation that was not related to this pending case;

3. Neither Mr. Risjord nor his law firm has ever represented Home Insurance Company in litigation that is related to this pending action;

4. Home Insurance Company does not pay a retainer fee to Mr. Risjord or to his law firm, but does employ his law firm from time to time on a case-by-case basis;

5. Mr. Risjord's firm was employed in January, 1974, to represent Home Insurance Company in a suit on a fire insurance policy, which suit is presently pending in the Circuit Court of Jackson County, Missouri;

6. In at least two of the cases consolidated into this multi-district proceeding, Mr. Risjord represents plaintiffs who have named Firestone as a defendant in their case; and

7. Home Insurance Company is the liability insurance carrier who insures Firestone against excess liability in two cases in which Mr. Risjord's clients have sued Firestone.

Based upon these findings, the court ruled that Risjord could avoid the conditional granting of disqualification by either withdrawing from the case in which he represented Home or by written consent of his clients and the Home in these damage suits (A155, A160).

Risjord filed a report to the court on August 28, 1979 containing the consents of the four plaintiffs and of Home (A167-183). All plaintiffs were informed of (1) Risjord's representation of Home in the *Cannova* lawsuit; (2) the listing of Home in Martindale-Hubbell; (3) the handling of cases for Home on a case-by-case basis for many years; and (4) that Home Insurance Company or affiliated companies may have an interest in the outcome of the case against Firestone because of the excess liability policy issued by Home to Firestone. With this knowledge, all plaintiffs signed a consent that Risjord continue to represent their interest against Firestone (A173-183). The Butler, Goodwin and Rodriquez affidavits also contained the consent

and approval of referring counsel, acknowledging that the affidavit and consent had been fully explained to the clients who gave their approval and affirmation (A175, A178, A183).

Home's consent was signed by Larry Wagner, Assistant Secretary. Wagner's affidavit stated the only case handled by Risjord was the *Cannova* case against several companies on fire policies, in which Home Insurance Company has 10% of the total coverage. At no time has the Risjord firm received information directly or indirectly from Home regarding Firestone Tire & Rubber Company, nor been employed to represent directly or indirectly Firestone with respect to the excess policy of Home issued to Firestone. Home was informed that Risjord represented plaintiffs against Firestone in the Butler, Goodwin, Hale and Rodriquez cases. Home consented to the continued representation of Home in the *Cannova* case (A170, A172).

Home instructed Risjord to withdraw from its representation in the *Cannova* case on November 6, 1979, because of the filing of a suit by Firestone against Home, and the considerable expenditure of time and money in it and in MDL 362 arising from Risjord's continued representation in the *Cannova* case. The letter again affirmed that the Risjord firm had not had access to nor will it ever have access to information that Firestone made available to Home (A192).

Risjord withdrew from representation of Home in the *Cannova* case on November 7, 1979 (A190), and filed with the district court an affidavit containing the letter and withdrawal (A188-189).

Firestone filed an action against Home in the United States District Court for the Western District of Missouri on October 25, 1979 based upon the Risjord representation. Firestone pleaded that Risjord represented Home in

at least one matter "unrelated to Firestone or wheels and rims" (A217, A219). Firestone filed a motion to hold Risjord in contempt on October 5, 1979, for failure to satisfy the conditions (A186-187) and later withdrew this motion (A194).

Risjord's discovery activities have resulted in an order from the District Court for the District of Columbia making available the Watergate documents with relation to the "political slush fund" theories asserted against Firestone and certain of the other defendants (Supp. Record Ex. D).

The district court certified its order under 28 U.S.C. § 1292(b) (A161). Firestone's notice of appeal was filed September 11, 1979 (A184-185) without seeking permission from the Court of Appeals (A201). Risjord's motion to dismiss the appeal was overruled, and the Court of Appeals for the Eighth Circuit ruled the issue of appealability under 28 U.S.C. § 1291 prospectively, and decided the case on the merits (A200-3).

SUMMARY OF ARGUMENT

I.

Orders denying disqualification of an attorney should not be appealable and the Court of Appeals for the Eighth Circuit properly so ruled in this case (A201-203, 612 F.2d 377).

In the last several years a growing number of circuits have ruled that such orders are not appealable.

The Court of Appeals for the District of Columbia carefully reviewed the experience of the other circuits, and the requirements of *Cohen v. Beneficial Industrial Loan Corp.*, 377 U.S. 541 (1949), and so ruled in *Community Broadcasting of Boston, Inc. v. Federal Communications Commission*, 546 F.2d 1022 (1976). The Sixth Cir-

cuit in *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290 (1979), relying on *Community Broadcasting,* overruled its former position and agreed that such orders were not appealable. The decision of the Eighth Circuit in this case followed shortly thereafter.

Firestone designates *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation,* 496 F.2d 800 (2nd Cir. 1974), as the leading case that orders denying disqualification of attorneys are appealable. *Silver Chrysler* was overruled by the Second Circuit in *Armstrong v. McAlpin,* ..... F.2d ....., No. 79-7042, on June 20, 1980.

The decisions rejecting the rule of appealability have held that the collateral order doctrine of *Cohen* (377 U.S. 541) is not met where there are orders refusing disqualification. Such cases do not involve issues of importance as defined by *Cohen,* as disqualification cases turn on the facts of a particular case and do not ordinarily involve principles of law or matters of public importance. Normal appellate processes are adequate to vindicate this interest, as they have been in the related but more serious situation where a District Judge has denied a motion for recusal. Further, the harm caused by erroneous denial does not create irreparable injury because the court retains its power to grant a new trial, or issue protective orders. *Community Broadcasting,* 546 F.2d at 1028, *Melamed,* 592 F.2d 296 and *Armstrong, supra,* at 11 and 12.

Appeals under 28 U.S.C. § 1291 were contrasted with those of 28 U.S.C. § 1292(b) by this Court recently in *Coopers & Lybrand v. Livesay,* 437 U.S. 463 (1978). This Court ruled unanimously, speaking through Mr. Justice Stevens, that the denial of certification of a class involved a case by case analysis of the facts, and denied appealability, distinguishing other decisions in which questions of public importance have been presented. Class action de-

terminations were said not to differ from other orders such as those involving discovery, venue or summary judgment.

Disqualification cases present another example of case by case analysis of the facts, and most of the Courts of Appeals have recognized the broad discretion placed in the district court and held that such decisions should not be overturned except for abuse of discretion.

Appeals of right from disqualification refusals thrust appellate courts distinctly into the trial processes and upset the balance between the function of the courts as established by the Congress (*Coopers & Lybrand v. Livesay*, 437 U.S. at 476).

The decisions of the Courts of Appeals rejecting appealability have observed the use and abuse of disqualification motions as a tactical weapon that are often simply disguised harassment and an instrument of delay. *Community Broadcasting*, 546 F.2d at 1027, *Melamed*, 592 F.2d at 295. The Second Circuit particularly has been plagued with a number of appeals on this question and the majority opinion in *Armstrong v. McAlpin* pointed to a substantial number of appeals that have resulted from this rule, which were not altogether reflected by reported decisions.

In this case, the District Judge certified the disqualification issue as appealable under 28 U.S.C. § 1292(b). Firestone did not obtain an order from the Court of Appeals permitting the appeal, and appealed directly under 28 U.S.C. § 1291. Firestone should suffer the same fate as the appellant in *Coopers & Lybrand v. Livesay*, who did not request such certification even in the district court, but appealed under § 1291 and saw the appeal dismissed.

II.

An Order refusing disqualification of Risjord was based on findings of fact by the District Judge and his exercise of discretion. The Court of Appeals ruled that the District Court did not abuse its discretion in refusing to disqualify Risjord (A157, 200).

Disqualification cases uniquely involve broad discretion in the District Judge (*Waters v. Western Co. of North America,* 436 F.2d 1072 [10th Cir. 1971]), and this makes particularly appropriate this Court's rule that except in most exceptional circumstances it will decline review where two courts below have passed on findings of fact. *Branti v. Finkel & Tabakman,* ..... U.S. ....., 63 L.Ed.2d 574, 580 (1980); *Graver Tank & Manufacturing Company v. Linde Air Products Company,* 336 U.S. 271 (1949). Under similar circumstances the Court has ruled that the issuance of the writ of certiorari was not warranted. *Rudolph v. United States,* 370 U.S. 269, 270 (1962).

III.

Firestone has never been a client of Risjord. Firestone's entire argument of conflict of interest is based on Risjord's representation of Home in a fire insurance case the District Court found to be unrelated to the rim cases against Firestone (A154, 157). There is no evidence that Home has disclosed any information on the rim cases to Risjord (A171, 192).

Firestone, never a client of Risjord, has no standing to attempt to disqualify Risjord and no interest that is protected under DR5-105. The excess policy under which Home insures Firestone, but has no duty to defend it (A234), creates no relationship that gives Firestone standing to disqualify Risjord. Home is a large insurer, writing many lines of insurance, and its consent to Risjord's rep-

resentation of the plaintiffs is understandable because there is no relationship between the rim cases and the fire case.

The District Court's ruling that consents from Home and the plaintiffs would dispel any adverse effect on Risjord's exercise of independent judgment on behalf of his clients was proper under DR5-105(C) and *International Business Machines Corporation v. Levin,* 579 F.2d 271 (3rd Cir. 1978). Disclosing to Home and plaintiffs the facts of representation of the other, much as set out in the findings of the Court in its order, Risjord obtained consents of Home and the plaintiffs (A167-183), which satisfied the Court's Order.

Great discretion should be placed in the District Judge because appearances may be misleading and what may appear to be a conflict of interest can be no conflict at all or so insignificant as to be overcome by other circumstances. *Waters v. Western Co. of North America,* 436 F.2d 1072 (10th Cir. 1971). This observation is particularly significant in this case, as the District Court had all of the facts before it when it made its ruling, and not just the few that Firestone has chosen to present to this Court.

After Risjord's later withdrawal from the *Cannova* litigation, and its dismissal, Risjord no longer represents Home (A188, Supp. Rec., Ex. C). Withdrawal from representation of one party or dismissal of the case eliminated any need for disqualification in two recent cases in an insurance setting, *Moritz v. Medical Protective Company of Fort Wayne, Indiana,* 428 F. Supp. 865 (W.D. Wisc. 1977); *Wong v. Fong,* 593 P.2d 386 (Haw. 1979).

Risjord has been a vigorous advocate in behalf of plaintiffs, and was selected as lead counsel for plaintiffs in the multi-district litigation. He has had substantial success in rim cases against other manufacturers, and publicity from this was urged unsuccessfully as a ground of dis-

qualification (A69-70). There are strong policy interests in the client being represented by counsel of his choice, and to allow disqualification where there is no direct relationship is not justified. Firestone's argument, based on the placement of the listing in Martindale-Hubbell, and the allegations of the intentional tort theory without informing this Court of other pleaded grounds of negligence and liability under *Restatement of Torts,* § 402A, is insufficient to justify disqualification.

Use of motions to disqualify is an abused tactical tool. *Melamed* (592 F.2d at 295) and *Armstrong* (*supra* at 9). Firestone, giving this Court only part of the facts, and by speculation and innuendo suggesting a factual situation unsupported by the record, should not obtain disqualification of a vigorous opponent.

ARGUMENT

I. On Order Denying a Motion to Disqualify Counsel on Ethical Grounds Is Not a Final Appealable Order Under 28 U.S.C. § 1291.

The Court of Appeals for the Eighth Circuit correctly held that an order denying disqualification of counsel is not appealable under 28 U.S.C. § 1291. In so holding the Court overruled its previous decisions and joined the more recent and better reasoned decisions of the Courts of Appeals for the D.C., Sixth, and Ninth Circuits now joined by the Second Circuit.

Firestone has argued that the order of the District Court refusing to disqualify Risjord is an appealable final decision under *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The *Cohen* collateral order doctrine was recently considered by this Court in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467 (1978). The Court, speaking unanimously through Mr. Justice Stevens, held that an

Order refusing to certify a class was not appealable under the *Cohen* doctrine, nor under a "death knell" doctrine that had been adopted by several of the circuits in such cases. The Court made clear that the *Cohen* exception applies to a small class of decisions, and gave the reasoning for such ruling in the following footnote citation from an earlier opinion of Mr. Justice Frankfurter, 437 U.S. at 467 n. 8:

> "Since the right to a judgment from more than one court is a matter of grace and not a necessary ingredient of justice, Congress from the very beginning has, by forbidding piece-meal disposition on appeal of what for practical purposes is a single controversy, set itself against enfeebling judicial administration. Thereby is avoided the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment. To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component element in a unified cause." (From *Cobbledick v. United States*, 309 U.S. 323 (1940)).

It is this recognition of the crippling effect on judicial efficiency of piece-meal review that has prompted the current trend in the circuit courts of appeal toward restricting immediate appeals from orders denying disqualification of counsel to those orders that are certified as appropriate for appeal under 28 U.S.C. § 1292(b). *See Armstrong v. McAlpin*, No. 79-7042, slip op. at 10 (2nd Cir. June 20, 1980); *Melamed v. ITT Continental Baking Company*, 592 F.2d 290, 295 (6th Cir. 1979); *Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1023 (D.C. Cir. 1976).

On June 20, 1980 the Second Circuit, overruled *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d 800 (1974) in *Armstrong*. The *Silver Chrysler* decision had provided the basis for the current positions of the Fourth and Seventh Circuits on the appealability of such orders. *See MacKethan v. Peat, Marwick, Mitchell & Co.*, 557 F.2d 395 (4th Cir. 1977); *Schloetter v. Railoc of Indiana, Inc.*, 546 F.2d 706 (7th Cir. 1976). *Silver Chrysler* had also been relied on by the Fifth and Tenth Circuits in support of their decisions on appealability. See *Woods v. Covington County Bank*, 537 F.2d 804 (5th Cir. 1976), (although this question is presently before the Court of Appeals from the Fifth Circuit, en banc, in *Abraham Construction Corporation v. Armco Steel Corporation*, 79-2007, but has not yet been ruled, *Church of Scientology of California v. McLean*, 615 F.2d 691, 692 (1980)); *Fullmer v. Harper*, 517 F.2d 20 (10th Cir. 1975).

The Courts that have recently reviewed appealability of orders denying disqualification have recognized the abuse of such orders (which we will presently discuss, I C) and consider whether the *Cohen* criteria applied in such cases.

Under *Cohen*, for an interlocutory order to be appealable under 28 U.S.C. § 1291, the order must (1) involve issues collateral to the merits of the action, (2) dispose conclusively of the disputed question, (3) resolve an important issue which does not merely involve the exercise of discretion, and (4) be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). An order denying a motion to disqualify counsel on ethical grounds does not meet the *Cohen* requirements.

A. An order denying a motion to disqualify counsel does not resolve important legal issues but rather involves a case by case exercise of discretion.

Interlocutory appeal under 28 U.S.C. § 1291 is necessarily inappropriate where the decision appealed from involves an exercise of discretion based on the facts of the case. In *Coopers & Lybrand v. Livesay* this Court, speaking unanimously through Mr. Justice Stevens stated (437 U.S. at 436):

> "* * * [A]llowing appeals of right from nonfinal orders that turn on the facts of a particular case thrusts appellate courts indiscriminately into the trial process and thus defeats one vital purpose of the final-judgment rule—'that of maintaining the appropriate relationship between the respective courts. . . . This goal, in the absence of most compelling reasons to the contrary, is very much worth preserving.' "
>
> Quoting *Parkinson v. April Industries, Inc.*, 520 F.2d 650, 654 (2nd Cir. 1975).

Most disqualification motions are decided on the basis of primarily factual determinations. *Armstrong, supra,* at 12; *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225, 227 (2nd Cir. 1977). Moreover, it is generally held that decisions on disqualification motions are to be left to the discretion of the district court. *See e.g., Central Milk Producers Cooperative v. Sentry Food Stores, Inc.*, 573 F.2d 988, 991 (8th Cir. 1978); *Gas-A-Tron of Arizona v. Union Oil Company of California*, 534 F.2d 1322, 1325 (9th Cir. 1976); *Hull v. Celanese Corporation*, 513 F.2d 568 (2nd Cir. 1975) (Br. III E). The district court is vested with such a broad grant of discretion because only the trial judge is in a position to separate apparent unethical con-

duct from actual improprieties that pose a threat to the integrity of the trial process and therefore require disqualification. *Waters v. Western Company of North America*, 436 F.2d 1072, 1073 (10th Cir. 1971). Thus, allowing interlocutory appeal as of right from denials of disqualification motions frustrates the final-judgment rule purpose of preserving the integrity as separate entities of the various courts that make up the federal judiciary. *Coopers & Lybrand v. Livesay, supra*, at 476.

This Court in *Cohen* was clear that not every order fixing security was subject to appeal, particularly where it involved an exercise of discretion as to the amount. "* * * Here it is the right to security that presents a serious and unsettled question. * * *" (337 U.S. at 547).

Thus, "another important factor bearing on the application of the *Cohen* doctrine . . . is whether a decision will settle a point once and for all, as it did in the *Cohen* case, or will open the way for a flood of appeals concerning the district court's ruling on the facts of a particular suit." *Weight Watchers of Philadelphia, Inc. v. Weight Watchers International, Inc.*, 455 F.2d 770, 773 (2nd Cir. 1972). It was on this basis that this unanimous court in *Coopers & Lybrand, supra*, carefully distinguished *Gillespie v. U.S. Steel Corporation*, 379 U.S. 148 (1964), noting that *Gillespie* had "disposed of an unsettled issue of national significance." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n. 30.

The particular issues involved in each case dealing with attorney disqualification cannot be considered to be important from the standpoint of setting down clear rules which can be followed in similar cases by other courts. *See Community Broadcasting of Boston, Inc. v. FCC*, 546 F.2d 1022, 1027 n. 38 (D.C. Cir. 1976); *Grinnell Corp. v. Hackett*, 519 F.2d 595, 597-598 n. 4 (1st Cir. 1975). The flood of appeals noted by the Second Circuit as a result of its

Silver Chrysler decision is evidence that no particular decision on a disqualification issue is likely to settle a potentially recurring question once and for all. *See Armstrong v. McAlpin, supra,* at 9, 10; *Allegaert v. Perot,* 565 F.2d 246, 247 (2nd Cir. 1977); *Eckles v. Furth,* 557 F.2d 953, 954 (2nd Cir. 1977); *International Electronics Corporation v. Flanzer,* 527 F.2d 1288, 1289 (2nd Cir. 1975).

Orders denying motions to disqualify counsel do not involve the existence of the disciplinary rules, or an important legal issue, but rather application of the rules on a case by case basis which of necessity involves the exercise of discretion. Such issues do not satisfy *Cohen* criteria.

B. Review after final judgment of an order denying motion to disqualify counsel does not present a danger of irreparable harm, except in extraordinary situations.

Orders denying disqualification of counsel do not satisfy the irreparable harm requirement of *Cohen. Armstrong* particularly found no irreparable damage because the Court retains its traditional power to grant a new trial if the District Court's ruling ultimately turns out to be incorrect, and the trial judge retains the power to protect the trial through protective orders or reconsideration of the need for disqualification. *Armstrong, supra,* at 11-12. The courts that have refused appealability of such orders have found that there was no claim of right that will be irreparably lost on appeal from final judgment in such cases. *Melamed,* 592 F.2d 296 and this case below (A202, 612 F.2d 378).

The argument that public confidence in the administration of justice will be irreparably harmed by delaying appeal until final judgment is no more persuasive in the attorney disqualification context than with other rulings that must await final judgment for correction.

All of the arguments that can be brought to bear in support of public policy and public confidence reasons for immediate appeal in disqualification of attorney cases apply with even more force in cases involving the recusal of the trial judge. No issue can be more critical to the integrity of the judicial process than those raised in recusal motions. Yet the Courts of Appeals have concluded that there is not such a danger of irreparable harm associated with denial of recusal motions as would justify application of the *Cohen* doctrine thereto. *In re Corrugated Container Antitrust Litigation,* 614 F.2d 958, 960-961 (5th Cir. 1980); *United States v. State of Washington,* 573 F.2d 1121, 1122 (9th Cir. 1978); *Rosen v. Sugarman,* 357 F.2d 794, 796 (2nd Cir. 1966).

In discovery orders as well as recusal, the remedy of reversal after final judgment upon a showing of prejudice has universally been held to be an effective safeguard against the possibility of irreparable harm. *See e.g., United States v. State of Washington,* 573 F.2d 1121 (9th Cir. 1978) (recusal motions); *Baker v. United States Steel Corporation,* 492 F.2d 1074 (2nd Cir. 1974) (discovery orders). That remedy must also be viewed as an effective safeguard against irreparable harm in the attorney disqualification context.

In *Coopers & Lybrand v. Livesay,* 437 U.S. 463, this Court was faced with the issue of whether a district court's class action certification denial is a "final decision" under 28 U.S.C. § 1291. Under the "death knell" doctrine that issue was made to turn on the court of appeals' determination as to whether the individual claims involved in the underlying action were sufficiently small to effectively preclude the possibility that the action would be maintained in the absence of a class certification. This Court held that such case by case decisions on the issue of whether an interlocutory appeal may be had must be made

under § 1292(b). The Court noted that allowing such appeals to proceed under § 1291 frustrates the Congressional purpose reflected in the adoption of § 1292(b).

The similarity between class determinations and many interlocutory orders in ordinary litigation, such as discovery, venue and summary judgment insofar as appealability is concerned, was noted by this Court in *Coopers & Lybrand v. Livesay*, 437 U.S. at 470.

This Court has considered irreparable damage under *Cohen* in a criminal setting in *United States v. MacDonald*, 435 U.S. 850 (1978). The unanimous court speaking through Mr. Justice Blackmun, pointed to the difficulty in measuring prejudice in speedy trial claims before final appeal (435 U.S. 850, 861). Similarly the issue of prejudice or taint in disqualification denials can best be measured by appeal after trial. The *MacDonald* decision observed that the double jeopardy claims in *Abney v. United States*, 431 U.S. 651 (1977) and the reduced bail in *Stack v. Boyle*, 342 U.S. 1 (1951) as well as posting of security at issue in *Cohen* involved rights that would be destroyed if not vindicated before trial. These cases are cited by Firestone in its brief. This description does not fit in disqualification cases, and the *Cohen* doctrine is not applicable.

The Courts of Appeals for the Third, Sixth, Eighth, Ninth and D.C. Circuits have all recognized that in some extraordinary cases it is possible that irreparable harm will result from delaying review of denial of disqualification motions until final judgment. The response of the latter four courts to that recognition has been to allow interlocutory review of such orders only under 28 U.S.C. § 1292(b) or 28 U.S.C. § 1651.

Clearly the remedies under § 1292(b) and § 1651 are preferable in that they enable courts to pick and choose

particularly worthy cases from among the class. This is opposed to the position taken here by Firestone which would recognize a class of interlocutory orders as appealable under § 1291 which in turn would give litigants the opportunity to protract proceedings, burden the judicial system and impose costs and expenses on the opposing party. Permitting appealability of orders denying disqualification as a matter of right is so potentially dangerous that it must be rejected.

The Court in *Armstrong* found irreparable harm to be more of a factor in cases where disqualification was granted. That issue is not presented in this case, but the separation of a client from the attorney of his choice presents a substantially different question on this issue (*Armstrong, supra,* at 13-15).

Armstrong further pointed to the continuing authority of the trial court in disqualification denials. Protective orders are available, and there can be reconsideration of the need for disqualification. *Id.* at 11, 12. Conditions may change, such as occurred in this case with the withdrawal from the *Cannova* case by Risjord, and its dismissal. This situation is not unlike the motion to disqualify on speedy trial grounds considered in *United States v. MacDonald,* 435 U.S. 859. These observations are applicable not only to the issue of irreparable damage but finality of the Court's order.

C. Practical considerations of the abuse of disqualification motions require that denial of such motions be appealable only after final judgment.

The *Cohen* exception is given a practical rather than technical construction. Strong practical considerations are persuasive that denials of disqualification orders should not be appealable.

Abuse of motions to disqualify counsel is recognized by a number of the circuits. Motions to disqualify have become "common tools of the litigation process, being used * * * for purely strategic purposes," and "tactics of an adversary proceeding". *Allegaert v. Perot,* 565 F.2d 246, 251 (2nd Cir. 1977). Attorneys now commonly use disqualification motions for purely strategic purposes. *Woods v. Covington County Bank,* 537 F.2d 804, 813 (5th Cir. 1976). There is great possibility of abuse of such motions, *Melamed v. ITT Continental Baking Company,* 592 F.2d 290, 295 (6th Cir. 1979), and such motions frequently involve "disguised harassment", in which the Court of Appeals for the Eighth Circuit in this case below agreed (A201, 612 F.2d at 378). *Armstrong v. McAlpin,* ..... F.2d ....., 79-7042 (2nd Cir. June 20, 1980) observed the use of such motions for purely tactical reasons, such as delaying the trial (*Id.* at 9), and with *Community Broadcasting of Boston, Inc. v. F.C.C.,* 546 F.2d 1022 (at 1027), the deluge of appeals and the increase in numbers of such motions and delay. The abuse of such motions has thus been recognized by five of the circuits, and not just the student comment as Firestone in its brief would suggest. (See the well reasoned and documented note, *The Appealability of Orders Denying Motions for Disqualification of Counsel in Federal Courts,* 45 U.CHI.L.REV. 450 (1978).)

The Second Circuit in *Armstrong* was concerned with the substantial increase in disqualification motions. Firestone criticizes this position. In replying to similar criticism voiced by a dissenting member of the Court, the *Armstrong* majority holds to the position that the motions have increased and that the number of published opinions is an inadequate measure of the prevalence of such appeals. *Id.* at 426 n. 9. The table attached as an addendum to this brief lists reported decisions on disqualification in all

the Circuit Courts of Appeals. It illustrates the impact on appellate dockets of disqualification motions.

Much of Firestone's criticism of *Armstrong* is contained in circuitous and ambiguous references to earlier parts of its own brief, but suffice it to say that the suggestions of alternative discretionary procedures in § 1292(b) or § 1651 have been recognized by the Court in *Coopers & Lybrand* as an essential element of preserving the congressional scheme of independence of the work of the trial and appellate courts, and by the Courts of Appeals in *Armstrong, Melamed, Community Broadcasting* and the Court below in this case.

Because of the serious and crippling delay engendered by the use and free appealability of such motions, practical considerations require that any interlocutory appeal from an order denying a motion to disqualify must be had pursuant to the discretionary certification procedures of § 1292(b). Turning on the facts as they do, only the discretionary procedures give the Courts of Appeals proper control over cases that should be heard.

II. The District Court and Court of Appeals Have Ruled Upon the Factual and Discretionary Issues Relating to Disqualification and Those Findings Should Not Be Disturbed by This Court.

The District Judge ruled the motion to disqualify, finding facts and exercising discretion. The Court of Appeals, after announcing its rule of appealability with prospective application, permitted the instant appeal, and concluded that the District Court did not abuse its discretion in refusing to disqualify Risjord (A203).

The factual issues in this case have thus been passed upon twice. Under similar circumstances, this Court has ruled that it should not reexamine the evidence and disturb these findings unless clearly erroneous.

The Court has recently stated in *Branti v. Finkel and Tabakman,* ..... U.S. ....., 63 L.Ed.2d 574 (1980), Note 6:

> "* * * In view of our settled practice of accepting, absent the most exceptional circumstances, factual determinations in which the District Courts and Courts of Appeals have concurred, we decline to review these and other findings of fact petitioner argues were clearly erroneous * * *."

Graver Tank & Manufacturing Company v. Linde Air Products Company, 336 U.S. 271 (1949), frequently cited by this Court, sets out the rule as follows (336 U.S. at 275):

> "* * * A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error * * *."

In *Berenyi v. Immigration Service,* 385 U.S. 630, 635-6 (1967), the Court follows this rule, stating that it had no empirical expertise to set against careful and reasonable conclusions of lower courts on purely factual issues, and would not apply the exceptional doctrine sometimes invoked when constitutional claims are involved.

In *United States of America v. Oregon State Medical Society,* 343 U.S. 326 (1952), the Court found the rule appropriate where there was "a vast record of cumulative evidence as to long-past transactions, motives, and purposes, the effect of which depends largely on credibility of witnesses." So in this case, it is not evidence but unsupported arguments of Firestone that go into motives and purposes, and the net effect is to attempt to create by speculation and inference a question relating to the credibility of the parties.

The Court of Appeals for the Eighth Circuit "carefully reviewed" the record in the District Court (A203). The brevity of its opinion and the decision to omit oral argument undoubtedly reflect the views of the Court of Appeals as to the merits of Firestone's claim (*See Heaney, Appeals Process in the Eighth Circuit,* 78 F.R.D. 261, 262-3).

While Firestone complains that the Eighth Circuit considered the case on the merits, both the Sixth and Second Circuits in *Melamed* and *Armstrong* followed identical procedures. Firestone thus was given full consideration on the merits, and under the rules followed in this Court has had the review that would be granted should this Court determine that the disqualification issue is appealable. Firestone's argument that the prospective ruling robs the case of being a case in controversy, overlooks the fact that the Court of Appeals for the Eighth Circuit determined the entire controversy when it could have ruled on appealability only and determined that no review of the issue on the merits was necessary, as did this Court in *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 477 (1978).

Broad discretion is placed in the District Judge in disqualification cases in weighing the facts and fashioning a remedy. See this Brief, III G. This rule fits hand in glove with the two-court rule discussed above.

Under circumstances similar to this, this Court has on several occasions determined that the issuance of the Writ of Certiorari is not warranted. *Rudolph v. United States,* 370 U.S. 269, 270 (1962).

III. The District Court Properly Permitted Risjord to Continue to Represent Plaintiffs in the Rim Cases With Consent of His Clients Under DR5-105(C), and His Later Withdrawal From the Home Fire Case and Its Dismissal Eliminate Any Claim of Conflict.

A. Firestone's argument is based on an abbreviated and incomplete statement of facts.

Firestone's Statement of the Case, Summary of Argument, and Argument are based on simplistically abbreviated facts that ignore most of the record that was the basis for the ruling of the District Judge.

The true nature of Risjord's representation of Home is ignored. Risjord represented Home, as one of six fire insurers against whom claim was asserted. This was his only case for Home in the last ten years, and his firm had a minimal number (A92, 94, 98). His representation and that of his firm have been in fire insurance matters, and not in liability insurance cases in which they have represented policyholders such as Firestone (A91, 95, 97, 99). The District Court found the litigation handled for Home was unrelated to the rim cases, and Risjord and his firm have not represented Home in litigation related to the pending action (A157-158).

Firestone makes no reference to the undisputed evidence that Risjord had furnished no information on the Multi-Piece Rim cases to Home and that Home had furnished no information to Risjord (A95, 172, 192).

Firestone does not inform the Court of the allegations in the complaints which are not only against Firestone, but other defendants, Goodyear, Budd and Kelsey Hays and which are based on defective products under *Restatement of Torts*, § 402A (A13, 29, 51, 63), and negligence, with

some ten pleaded failures that seem particularly appropriate in negligence actions (A15-16, 30-32, 52-53, 63-65), as well as the allegations of willful and intentional misconduct and fraudulent misrepresentation (A19-23, 33-38, 43-48, 55-60, 67-71). The denial or reservation of rights of Home goes only to the willful or intentional acts and punitive damages (A113-116, 198-199). The net result is that Home is accepting coverage on the claims of negligence and defective products.

Firestone does not mention that Risjord filed a complaint on behalf of another plaintiff against Goodyear alleging identical claims based on defective products and negligence, as well as intentional or willful misconduct or misrepresentations (A205-216). No reference is made to letters written by Home with relation to five non-Risjord lawsuits denying coverage because of allegations of intentional acts or misrepresentations, or willful acts or intentional concealment (A117-123).

Firestone refers on numerous occasions to the unsophisticated plaintiffs, and the consents they gave, but nowhere tells the Court that the three plaintiffs involved in Home insured cases were represented by referring attorneys who explained the affidavit and consents fully to their clients, obtained their approval, and themselves consented to the continued representation (A175, 178, 183).

These facts, together with Firestone's argument concerning Risjord's long-standing relationship with Home and the intentional tort theory and letters of reservation of rights (Br. 3-4, 33-34) were known to the experienced District Judge.

While omitting many facts that are in the record, Firestone by skillful argument weaving speculation, inference and innuendo together makes assertions of potential col-

lusion, that Risjord is influenced by Home's interest (Br. 11) in asserting theories helpful to Home (Br. 37), and that Home is determined to have Risjord as its ostensible adversary with the two appearing to act in tandem (Br. 44). These assertions are not supported by any evidence and are simply not true. The observation of the District Judge that he regarded many speculative matters as immaterial (A153) would apply to such statements.

B. There was no attorney/client relationship that gives Firestone standing to disqualify Risjord, and Risjord's representation of Home creates no conflict with Firestone.

Firestone has never been a client of Risjord (A154). Firestone is thus an unauthorized surrogate, having no standing to disqualify Firestone. *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 88 (5th Cir. 1976), the court states:

> "As a general rule, courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification. [Citing cases]."

The *Yarn Processing* case further states at p. 90:

> "To allow an unauthorized surrogate to champion the rights of the former client would allow that surrogate to use the conflict rules for his own purposes where a genuine conflict might not really exist."

This rule was applied by the Missouri Court of Appeals for the St. Louis District in *Payne v. St. Louis Grain Corporation,* 562 S.W.2d 102 (1977). The District Court in Rule 43 (IV)(B) has adopted the Code of Professional Responsibility of the Missouri Supreme Court, and this case is persuasive. There the lawyer had represented St. Louis Grain, and in the case in question was represent-

ing Westchester, one of St. Louis Grain's two insurers involved in dispute as to coverage. Second insurer moved to disqualify and the court stated (l.c. 106):

> "It appears to us that appellant Commercial has no standing to raise this issue. 'The objection that an attorney is disqualified by reason of his representing adverse interests is available only to those as to whom the attorney in question sustains, or has sustained, the relation of attorney and client.' [Citing *Yarn Processing* and other cases]."

Firestone's fragile position, when all the semantic gloss is stripped aside, is that Risjord should be disqualified because he was lawyer for a group of six fire insurers, including Home, in the *Cannova* litigation which is "unrelated to Firestone or wheels and rims" (A219). Home is not a party to the rim litigation but provides excess insurance over $500,000 with Firestone having the contractual obligation to defend itself (A92, 154, 234). Risjord and his firm have never represented Home in litigation related to the pending case (A157). Neither Risjord nor Home has furnished information to the other concerning the Multi-Piece Rim case (A95, 171, 192).

Firestone has cited no authority that under the circumstances which were before the District Judge in this case, Risjord had any relationship with Firestone that required either consent from Firestone or Risjord's disqualification. The District Judge ruled that consents from the plaintiffs and Home, or withdrawal from representation of one or the other, would dispel any concern about adverse effect on the ability of Risjord to exercise independent judgment (A153-155, 160).

Firestone, never a client of Risjord, has no basis to assert DR5-105 on its own behalf. The essence of Canon 5 and the potential danger it is designed to guard against is

failure of an attorney to represent one client properly because of a relationship with another client whose interests are in conflict with that of the first. It is the client, Home, and not an adverse third party who may have a contractual relationship with it such as an excess insurance policy, that is protected. DR5-105(A) and (B) defines such conflicts and DR5-105(C) allows representation with consent of the clients. Conflict between *clients* is the subject of the rule. *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83, 90 (5th Cir. 1976); *International Business Machines Corp. v. Levin*, 579 F.2d 271, 282 (3rd Cir. 1978).

Firestone's position is that with no direct relationship with Risjord, Firestone should have a right to consent to the representation of plaintiffs asserting the claim against Firestone because of Risjord's representation of Home in totally unrelated matters. Firestone would stretch the Code of Professional Responsibility beyond all limits of reason. There is nowhere any intention that a party in litigation has to approve counsel for his opponent, and such a position runs directly contrary to the letter and spirit of the rules.

Firestone's entire argument is based upon the ambiguous word *all* as it appears in *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2nd Cir. 1976), which it quotes repeatedly. However, the explicit language of DR5-105(C) and EC5-16, provides that clients, and not an outside party, must consent, and the *all* in *Cinema 5* refers to clients. Both DR5-105, relied upon by the District Court, and EC5-16 refer to representing interests of *"each client"* and that *"each client"* must consent. *E.g., International Business Machines v. Levin*, 579 F.2d 271 (3rd Cir. 1978); *In re Yarn Processing Patent Validity Litigation*, 530 F.2d 83 (5th Cir. 1976); *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D. N.J. 1977). The step from *each client* to *all persons*

is simply another symptom of the overbroad and misleading arguments made by Firestone.

Firestone cannot demonstrate conflict. Its singular quotes from *Matter of Kelly v. Greason,* 23 N.Y.2d 368, 296 N.Y. Supp. 2d 937, 244 N.E.2d 456 (1968), are simply not applicable. Here one member of a law partnership was an adjuster for Nationwide Insurance Company and the partnership handled claims against Nationwide and in one instance the claim was actually handled by the partner adjuster. Similarly, *Holloway v. Arkansas,* 475 U.S. 435 (1978), is distinguishable because it involves an attorney appointed to represent three criminal accuseds.

Home's excess insurance policy covering Firestone gives Firestone no basis to raise the claim of conflict. The Home excess policy places the duty to either settle or defend lawsuits on Firestone (A23, 34). This differs from many liability policies where the insurer agrees to provide a legal defense to suits against the policyholder, which creates an attorney/client relationship between the lawyer and insured as in *Tomerlin v. Canadian Indemnity Company,* 61 Cal.2d 638, 39 Cal. Rptr. 731, 394 P.2d 571 (1964), cited by Firestone. *Tomerlin* is distinguishable since the lawyer had two clients, insurer and insured, with conflicting interests relating to the same case.

The absence of the duty to defend by the insurer is of critical importance since Firestone frequently argues the fiduciary relationship of Home. It has been held that where there is no exclusive right to defend or settle, there is simply a debtor-creditor relationship rather than a fiduciary relationship. *Craig v. Iowa Kemper Mutual Insurance Company,* 565 S.W.2d 716, 723 (K.C. Mo. App. 1978) and *Chavez v. Chenoweth,* 553 P.2d 703 (N.M. 1976) and *Couch on Insurance 2d* § 23.11. If there are problems arising out of the relationship between Firestone and Home,

Firestone has instituted litigation on the subject (A217) and these issues can be decided in that litigation.

Insurance companies frequently find themselves involved in lawsuits where they insure two or more parties in the same occurrence, and must provide separate representation with full disclosure (See *"Conflicts of Interest in Defending Insurance Cases," Conflicts of Interest in Practice,* The Defense Research Institute, 1971, Vol. No. 5, p. 22; *Guiding Principle VIII* cited therein at pp. 33-34, and in Martindale-Hubbell Law Directory, Vol. VII, 1978, p. 77M; and Annot. 18 A.L.R.3d 482 (1968). In this case, we are not dealing with two policyholders involved in the same dispute. The fire policy issued to *Cannova* by Home and the excess liability policy issued by Home to Firestone provide insurance coverage for two different kinds of risks that are not related in any way.

Home is one of the largest insurers in the United States. A recent comparison ranks Home as thirteenth in the nation in premium volume, which was in excess of 1.6 billion dollars per year. 81 *Best's Review, Property/Casualty,* June 1980, p. 10. Home writes 12 types of insurance coverage for which underwriting results are separately calculated, including fire and miscellaneous liability, and maintains service and claim offices in over 100 principal cities in the United States and Canada. *Best's Insurance Reports, Property-Casualty,* 1979, 627-8. These published reports do not indicate the number of policyholders with Home, but it is obvious that the number is most substantial. Firestone's position, simply put, is that any lawyer that has ever represented Home in an unrelated matter would be disqualified from filing suit against any of Home's thousands of policyholders.

The fact that Home has a monetary interest in excess exposure of Firestone gives Firestone no right to disqualify

Risjord, nor would it give the right to disqualify the other lawyers over the United States who may have represented Home in totally unrelated ltiigation. Home has not objected, and Firestone has no right to do so.

C. The requirements of Canon 5 and DR5-105 (A)-(C) have been satisfied by the court's requiring the consents of Home and plaintiffs which are fully adequate.

The action of the District Court that Risjord not be disqualified in the Firestone cases if he obtained consents from Home and plaintiffs was clearly authorized under DR5-105.

The District Judge found consent to be a proper approach based upon *International Business Machines Corporation v. Levin*, 579 F.2d 271 (3rd Cir. 1978). Here, the Carpenter firm (CBM) represented Levin in an antitrust case against IBM and had represented IBM in labor and replevin cases. The court in *Levin* disqualified CBM, and this order was affirmed.

The *Levin* decision underscores the wide discretion of the district judge in framing sanctions that will be just and fair to all parties involved (l.c. 279) and approved the trial court's findings stating (l.c. 281):

> "These findings, with which we agree, support the district court's conclusion, which seems to us reasonable and just, that CBM was obligated in these circumstances at the very least to disclose fully to CBM the facts of its representation of the plaintiffs and obtain its consent."

Consent as a viable alternative under DR5-105 is recognized. Unlike the present case there was no adequate disclosure of the conflict of IBM, there was disputed testimony

concerning the issue of consent, and there was specific objection by IBM (l.c. 282).

The *Levin* case does differ significantly from Risjord's representation of Home in that in *Levin* there was a pattern of repeated retainers, including several immediately before and four after the filing of the case. The ongoing and repeated instance of a relationship went far beyond the now terminated representation of Risjord. Further *Levin* involved a client, IBM, and not an insurer, with only a contractual insurance relationship with the client.

Nevertheless, the *Levin* case fully supports the action taken by District Judge Collinson. Based upon the facts before it, and *Levin,* the District Court determined that simultaneous representation by Risjord of Home in the unrelated *Cannova* litigation and of the plaintiffs in the rim cases could be undertaken with consent after full disclosure, and this would dispel any adverse effect on Risjord's exercise of independent professional judgment on behalf of each client (A153-155, 160).

Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976) and *Matter of Kelly v. Greason,* 23 N.Y.2d 368, 296 N.Y. Supp. 2d 937, 244 N.E.2d 456, 460, 461 (N.Y. 1968), relied upon by Firestone, demonstrate that representation of opposing parties may be undertaken with the knowledge and consent of those involved. This is exactly what Judge Collinson required as one of the alternatives, and the consents were properly filed. In *Cinema 5* the lawyer with the conflict, Fleischmann, offered to withdraw from one of the cases, but the offer was not accepted, and the court concluded he continued to have one foot in each camp (*Id.* at 1387). Just as the Courts in *Levin* and *Cinema 5* upheld the exercise of discretion of the District Judge, so this Court should uphold the ruling of Judge Collinson

which has now been complied with, both by withdrawal and consent.

Firestone is eager to accept the provisions in DR5-105(A) and (B) and the District Court's findings relating to Risjord's exercise of independent professional judgment. Firestone, however, prefers to ignore the provisions of DR5-105(C) providing that consent makes possible representation of those clients. Any possible conflict was between Home and the plaintiffs in the rim litigation, and under these circumstances it is obvious that Risjord could continue in his representation of each with consent. By arguing that the existence of a potential for conflict compels disqualification without reference to the application of DR5-105(C) and its consent provisions, it is Firestone that would limit the working of this rule, to its own advantage, just as it limits the evidence that it is willing to discuss with the Court.

Firestone is urging a conflict of interest that is far more technical than actual based on Risjord's representation in the totally unrelated fire case. *Acorn Printing Company v. Brown*, 385 S.W.2d 812, 817 (Spr. Mo. App. 1964). That court recognized that disclosure and consent of the parties being represented would satisfy any objection of conflict and pointed out that the injured party Acorn was not complaining.

In *Messing v. FDI, Inc.*, 439 F. Supp. 776 (D.N.J. 1977), representation of both outsiders and insiders in a corporate derivative action was seen as a "real potential for conflict," but the court determined that the disclosure requirements of DR5-105 would be fulfilled if disclosure affidavits and agreement to continued representation were submitted to the court. *Id.* at 784. *See also, In re Yarn Processing Patent Validity Litigation, supra.*

D. The consents filed by Risjord are fully adequate to satisfy the court's order and the requirements of DR5-105(C), and Firestone did not question their adequacy before appeal.

Firestone did not call to the attention of the trial court the adequacy of the consents before the appeal was filed and did not seek relief from the District Judge. Firestone filed its Notice of Appeal on September 11, 1979 (A184-185) after Risjord had filed his report containing the consents on August 28, 1979 (A167-183). The only time that the nature of the consents was called to the attention of the trial court was a motion for contempt filed October 5, 1979 (A186-187) which was later withdrawn November 30, 1979 (A194). Under these circumstances Firestone cannot ask this Court to pass upon the adequacy of the consents when the District Judge was not asked to do so. Firestone sought a finding of fact in the first instance from the Court of Appeals, and now from this Court.

The consents speak for themselves and make full disclosure of the potential conflict that troubled the court, and each of the parties consented to continued representation.

Home, by its assistant secretary, Larry Wagner, confirmed that he knew of Risjord's representation of the plaintiffs in the Firestone cases and agreed to the continued representation of Home's 10% interest in the *Cannova* fire case (A170-172). Home, after all, would have no way of consenting to Risjord's continuing representation of the individual plaintiffs. Only the plaintiffs could give such consent. Home's consent is fully adequate to comply with the order of the District Court. This consent was in full force until Risjord was notified to withdraw by Home and did so (A191-193, 190).

The nature of Risjord's representation of Home undoubtedly bears upon Home's consent. Risjord's work for Home had been in fire insurance cases. He had not represented Home's policyholders in litigation for 19 or 20 years, and he is not aware that his law firm has, although he stated that was possible (A95, 99). He had made a number of claims against Home policyholders (A97). Risjord's confusion as to the fire company and the liability company may not be in accord with the corporate technicalities (see *Best's Insurance Reports, Property-Casualty,* 1980, pp. 625, 626), but he was definite about the nature of the fire work that he had done for Home.

The Home consent is understandable under this reasoning from *In re Yarn Processing Patent Validity Litigation,* 530 F.2d 83, 89 (5th Cir. 1976):

> "A former client may consent to the employment of the attorney by an adverse party even where the former client is involved in the case as a party. In Consolidated Theatres v. Warner Bros. Circuit Management Corp., 216 F.2d 290, 296 (2nd Cir. 1954), the court explained that this might typically occur where the former client realizes that any prior disclosures will not prejudice him in the new case. Such consent will prevent the disqualification of the attorney even in a criminal case."

Similarly, all of the individual plaintiffs in their affidavits acknowledged the Risjord firm's listing of Home in Martindale-Hubbell and that it has handled litigation for Home. All acknowledged Home had an interest in the outcome of their case against Firestone because of the excess policy. With this knowledge of the relationship of Risjord to Home, each consented that Risjord should continue his or her representation (A173-183). While Firestone dwells upon the consents from the unsophisticated clients (Br.

36), it nowhere mentions that in Butler, Goodwin and Rodriquez referring counsel had fully explained the consents to the clients, and the clients agreed (A175, 178, 183).

With this knowledge, these plaintiffs could consent to Risjord's continuing representation in their case, but would have no right to consent on behalf of Home. It is the knowledge of Home's role in the case that gives rise to the need for consent of plaintiffs, and this consent was properly given.

Firestone's argument as to the inadequacy of information given to the plaintiffs or to Home is belied by the language of the consents which follows the findings of fact the District Judge found significant, as well as the extensive argument by Firestone in its brief, which simply underscores the adequacy of the information given and the consent taken (Br. 42). The consents obtained by Risjord were proper in every way in spite of the objections now raised by Firestone.

E. Risjord's termination of representation of Home conclusively eliminates any question of conflict.

While the consents should end the inquiry, the situation that has come before this Court has not been a static one. Risjord's representation of Home has terminated, the *Cannova* litigation concluded, and Home is now a former client of Risjord. During that representation, there was no exchange of information related to the rim cases.

Two cases in an insurance setting support the District Court's ruling and are particularly applicable in view of Risjord's withdrawal from representation of Home and the complete disposition of the *Cannova* case. In *Moritz v. Medical Protective Company of Fort Wayne, Indiana*, 428 F. Supp. 865 (W.D. Wisc. 1977), Medical Protective hired

Liddle to defend its insured Moritz in a malpractice case filed by Jacobsen. Moritz told Liddle he was contemplating suit against Medical Protective because of its failure to appeal an earlier Scofield case (defended by other attorneys selected by Medical Protective), and when he did so Liddle was assigned defense of this case. Liddle decided to accept this assignment and to withdraw from defense of the Jacobsen case.

The Court ruled that the subject matter of the Jacobsen malpractice case was not related to the dispute between Moritz and Medical Protective over the failure to appeal the earlier Scofield case, and therefore Liddle was not required to decline the employment offered by Medical Protective. The Court considered the responsibility of Liddle under Canons 4, 5 and 9 with provisions identical to Missouri and ABA Codes and overruled a motion for disqualification on the condition that Liddle and his firm withdraw as attorneys for Moritz in the Jacobsen case (428 F. Supp. at 875-6).

A similar case is *Wong v. Fong,* 593 P.2d 386 (Haw. 1979). Here the Fujiyama firm represented Dr. Wong in a malpractice case and during part of the same period represented Transportation Lease Hawaii, Ltd. in a separate action for damages against Dr. Wong, based on Wong's liability as a guarantor of performance of Penn. After the question of conflict of interest was raised, the Fujiyama firm was willing to withdraw as counsel for Wong in the malpractice action and a petition was filed to disqualify the firm in the Trans Lease case.

Citing the cases chiefly relied upon by Firestone in its brief (*Cinema 5* and *Matter of Kelly, supra*), the court found that with settlement or dismissal of the malpractice case and the fact that the Fujiyama firm had not acquired any confidential or prejudicial information during the at-

torney-client relationship with Wong, as here (A95, 172, 192), no harm could have been suffered by Wong. The concerns relating to the vigor and independence of representation did not apply once the relationship with Wong had been terminated by Fujiyama.

Firestone in its brief urges that Risjord's withdrawal and later the dismissal of the suit are of no moment (Br. pp. 3-4, notes). *Moritz* shows the significance of the withdrawal and *Wong* the termination of the relationship. *Wong* further pointed to the waste that would be involved in replacing counsel, which is a significant concern in our case because Risjord is lead and liaison counsel in the multi-district litigation.

Wong and *Moritz* present an even closer relationship for the attorneys were hired by insurers with contractual duty to provide a defense to represent the insured, Moritz and Wong, and accordingly a direct attorney/client relationship existed between the lawyers and the insured client. In our case, any representation of Home was totally unrelated and created no attorney/client relationship between Risjord and Firestone. Other cases with closer relationships finding no conflict include *Armstrong v. McAlpin, supra*, and *Whiting Corp. v. White Machinery Corp.*, 567 F.2d 713 (7th Cir. 1977).

In *Hoffman v. Hogan*, 137 S.W.2d 441 (Mo. 1940), the lawyer Peal represented Hogan in the tax suit and later represented Hoffman against the Hogans. The court states at 446:

> "The test of inconsistency is not whether the attorney has ever appeared for the party against whom he subsequently proposes to appear, but it is whether his accepting the new retainer will require him to do anything which will injuriously affect his former client

> *in any matter in which he formerly represented him, and* whether he will be called upon *to use against former client any knowledge or information acquired through their former connection.*" (Emphasis supplied).

The definition in *Hoffman* is based on the particular matter in which the lawyer represented the client.

Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980), is similar. Berman was an associate with the firm representing the McLeans in defense of a slander suit and before coming to that firm had consulted the church about a zoning matter. The Court pointed out that there was no evidence that the church discussed any issue in the slander suit with Berman or that he had confidential information about it, the same situation that exists in our case (A95, 172, 192). The Court states (l.c. 692):

> "* * * A lawyer need not disqualify himself in a matter concerning a former client unless the terminated employment had some substantial relationship to the pending suit or unless he has received some privileged information * * *."

The Court ruled that Berman's earlier involvement was not related to the slander suit, and affirmed denial of disqualification.

Thus, the terminated relationship of Risjord and Home creates a situation in which Home would have no right to object to Risjord's representing the plaintiffs in this case. No information had been obtained from Home concerning the rim cases and since there was no relationship between Risjord's representation of Home and plaintiffs, there can be no presumption of the transmittal of such information. *E.g.*, Canon 4, Code of Professional Responsibility; *Arkansas v. Dean Foods Products Co.*, 605 F.2d 380, 383-4 (8th Cir.

1979); *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2nd Cir. 1978); *Trone v. Smith*, ... F.2d ....., No. 77-1832 (9th Cir. June 23, 1980). Home having no right to object, Firestone can have no right to object.

F. The discretion of District Judge Collinson was very broad and his order should be reversed only for clear abuse of his discretion.

The broad discretion placed in the District Judge, and the scope of review of his order is demonstrated by the following statement in *Fred Weber, Inc. v. Shell Oil Company*, 566 F.2d 602, 605 (1977):

> "We apply the scope of review in disqualification cases described in Hull v. Celanese Corp., 513 F.2d 568 (2d Cir. 1975): 'The district court bears the responsibility for the supervision of the members of its bar. [Citing authorities.] The dispatch of this duty is discretionary in nature and the finding of the district court will be upset only upon a showing that an abuse of discretion has taken place. [Citing authorities.]' 513 F.2d at 571."

The court has wide discretion in framing its sanctions in motions to disqualify so as to be fair and just to the clients and their attorneys. *International Business Machines v. Levin*, 579 F.2d 271, 279 (3rd Cir. 1978). Courts of Appeals have emphasized the great reliance placed on the District Judge's exercise of discretion. *E.g., Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977).

The reason for the rule is the superior position of the trial judge to evaluate the factual situation before him. As was observed in *Waters v. Western Company of North America*, 436 F.2d 1072, 1073 (10th Cir. 1971):

> "However the discretion of the trial judge in such matters is very broad for appearances may be misleading and the overall proper administration of justice may well allow the trial judge to ignore appearance in favor of fact. What might appear as a conflict of interest on the surface can, in fact, be no conflict at all or so insignificant as to be overcome by other circumstances."

A similar rule has been pronounced in most of the circuits. In addition to the above cases, *see, e.g., Hull v. Celanese Corp.*, 513 F.2d 568, 571 (2nd Cir. 1975); *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation*, 518 F.2d 751 (2nd Cir. 1975); *Gas-A-Tron of Arizona v. Union Oil Company of California, et al.*, 534 F.2d 1322, 1325 (9th Cir. 1976).

Application of this rule is particularly important in this case. Firestone has concentrated upon and repeated only a few of the facts (as it mentioned the Martindale-Hubbell listing six times to the District Court [A151]) and omits a substantial part of the record that was before the District Judge (See III A). The District Judge had *all* the facts before him, and there should be no finding of an abuse of discretion.

G. The true reason for Firestone's motion is to eliminate a vigorous advocate.

The decisions on disqualification motions in the Courts of Appeals have recognized the abuse of such motions (*Melamed, supra* at 295), and their use as a common tool for purely strategic or tactical purposes (*Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977) and *Armstrong, supra,* at 9). Certainly, the arguments stressed vigorously by Firestone are those of an "artful movant" that have caused

expenditure of judicial and opponent resources (*Armstrong, supra,* at 29 n. 13).

Firestone has pleaded not only its own case, but most cynically that of the plaintiffs asserting claims against it. Firestone makes no claim that the vigor of Risjord's representation is an issue. There is no such reservation expressed by the District Court (A154, 160). There is no reconsideration of the Court's order approving Risjord as lead and liaison counsel for plaintiffs (A81). The certificate of the clerk showing the docket entries in MDL 362 and numerous deposition and discovery activities show the extent of Risjord's efforts in these cases. Publicity surrounding a case in which Risjord had successfully represented a plaintiff in a tire rim case against Goodyear was an issue raised unsuccessfully in the district court (R69-70). The efforts of Risjord to probe deeply into the "political slush fund" issue (Supplemental Record, Ex. D) involving various individuals and documents involved in the Watergate investigation shows the vigor and success of Risjord's representation of the plaintiffs. Risjord's experience and expertise in this case have been of substantial benefit to plaintiffs and the others involved in the Multi-Piece Rim litigation over a two and one-half year period of time. While Firestone expresses concern in its brief with Risjord's representation of these plaintiffs, it does not attack the vigor of this representation, and it is probable that its concern with Risjord's representation of plaintiffs is because it has been performed with such vigor and success.

Firestone argues that Risjord has asserted a "highly unusual theory" of intentional tort (Br. 4, 34, 37) and argues that Risjord's action, coupled with Home's reservation of rights letters on such theory established the conflict. Firestone ignores the fact that the complaints against not only

Firestone, but Goodyear, Kelsey Hays and Budd, plead claims based on defective products under *Restatement of Torts,* § 402A and negligence (A13, 29, 51, 63, 15-16, 30-32, 52-53, 63-65). Home would cover such theories. Pleading alternative theories in products liability cases is the usual and proper practice in such cases, and a plaintiff is ordinarily allowed to introduce evidence as to the several pleaded grounds and have the case submitted to the jury on all grounds of which there is submissible evidence. *Products Liability, Frumer & Friedman,* Vol. IIIA, § 4601, pp. 16-56, 16-58.1. A number of these theories, including the intentional theory would be a basis for punitive damages. See Owen, *Punitive Damages in Products Liability Litigation,* 74 MICH.L.REV. 1258, and specifically the enumeration of punitive damages awards in Notes 333, 334, pp. 1326-1329.

Certainly, plaintiffs can be properly represented only by counsel who will assert all theories that would justify recovery of either actual or punitive damages to the greatest extent possible. Risjord will undoubtedly try the cases in this manner. Alternative submissions of the varying theories could well produce verdicts that would be covered by the Home policy, as well as verdicts or portions of verdicts that would not be so covered. Firestone's argument that Home and Risjord are working together, or working "in tandem" simply cannot stand, because it is against Home's interest. Similarly, it is in Risjord's interest to prosecute the cases to the utmost. The contractual relations between Home and Firestone may in part determine the obligation to pay judgments but involve Risjord in no conflict of interest with Firestone.

In two earlier cases in the Eighth Circuit, *Meat Price Investigators Association v. Spencer Foods, Inc.,* 572 F.2d 163 (1978), and *Central Milk Producers Cooperative v.*

Sentry Food Stores, Inc., 573 F.2d 988 (1978), the Eighth Circuit pointed to the strong interest in the client being represented by counsel of his choice and the impact that separation of the attorney from the case will have with respect to ultimate disposition of the case.

While factors other than the interests of the client are considered in such cases, the District Court properly balanced these factors in making its order. Firestone filed its motion to disqualify Risjord after he had been designated as lead and liaison counsel at the April 10, 1979 pretrial conference. The Risjord cases against Firestone were filed June 5, 1978, August 29, 1978 and October 31, 1978 (A12, 28, 50, 62) and the motion to disqualify Risjord was filed May 24, 1979 (A104). Firestone's counsel, William Sanders, represented Risjord four years ago and knew of his representation of Home at that time (A92-94). Thus, Firestone is either barred by laches or is estopped to raise its objections to Risjord's continued representation of plaintiffs. *E.g., Central Milk Producers Cooperative v. Sentry Food Stores, Inc., supra; Redd v. Shell Oil Company*, 518 F.2d 311 (10th Cir. 1975). At the very least, this delay should be taken into consideration in weighing the validity of Firestone's motion.

Firestone's conduct in delaying its objection to Risjord's representation is further demonstration that Firestone's motives are not in the public interest, but rather that the disqualification motion is a convenient tool to eliminate an effective advocate for its opponents.

H. There is no appearance of impropriety, and this ground standing alone does not justify disqualification.

Cases considering disqualification motions have held that there will be no presumption of lack of integrity. *Fred Weber, Inc. v. Shell Oil Company,* 566 F.2d 602, 609 (8th Cir. 1977). It was stated in *Church of Scientology of California v. McLean,* 615 F.2d 691, 693 (8th Cir. 1980):

> "* * * An attorney's conduct need not be governed by standards that can be imputed only to the most cynical members of the public. A lawyer need not 'yield to every imagined charge of conflict of interest, regardless of the merits, so long as there is a member of the public who [says that he] believes it' * * *." *Woods v. Covington County Bank, supra,* 537 F.2d at 813.

Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976), pointed to the tactical use of disqualification motions and that a cynical approach would often unfairly deny a litigant to counsel of its choosing.

The appearance of impropriety condemned in Canon 9 was considered in *Board of Education v. Nyquist,* 590 F.2d 1241 (2nd Cir. 1979), and the court observed (l.c. 1247):

> "* * * We believe that where there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases. * * *"

Firestone does not make a supported claim that the trial will be tainted by Risjord's representation of the plaintiffs. The *Nyquist* case set forth a two-pronged definition of taint. It included (1) the use of privileged information obtained through prior representation, which is not applicable in this case (A95, 172, 192), and (2) that a conflict under-

mines the Court's confidence in the vigor of the attorney's representation of the client. As demonstrated under III G, Risjord's representation of plaintiffs has been most effective and vigorous.

Firestone, based on claims of appearances and in arguments grounded in speculation and innuendo, rejected by the trial court (A153), attempts to assert the public interest just as it has asserted the plaintiffs' interest. As was observed in *Woods v. Covington Bank*, 537 F.2d 804, 813 (5th Cir. 1976):

> "* * * the more frequently a litigant is delayed or otherwise disadvantaged by unnecessary disqualification of his lawyer under the appearance of impropriety doctrine, the greater the likelihood of public suspicion of both the Bar and the judiciary * * *."

The interest of the public in the integrity of the judicial process is that Risjord, the vigorous advocate, continue to represent the plaintiffs in asserting their claims against Firestone.

Firestone's concerns of appearance of impropriety and the public interest are inconsistent with the actions of its own counsel. Professor Rotunda and associate Carothers make affidavits relating to disqualification motions (A107, 111, 197). The professor providing citations of authority for Firestone's brief and Carothers are witnesses, as well as counsel to Firestone, in violation of DR5-102. Similarly, attorney Sanders, who is counsel in this action against Risjord, has represented Risjord (A92-94) and lists Home as a client in Martindale-Hubbell Law Directory (Vol. IV, pp. 99B, 1979), although he is counsel of record for Firestone against Home in a separate proceeding (A217). These conflicting representations raise questions as to the consistency and credibility of Firestone's claims.

I. Firestone's desire to disqualify Risjord in the Hale case is beyond the relief sought in the District Court.

Firestone suggests in a footnote only, but without argument, that not only should Risjord be disqualified as to the three cases in which Home provides coverage, Butler, Goodwin and Rodriquez, but also that Risjord should be disqualified in the Hale case as to which Home does not afford coverage (Br. p. 2, note 3).

This relief is beyond the scope of that requested in Firestone's motion, which asked his disqualification in Multi-Piece Rim cases against Firestone in which Home insures Firestone, or in which information obtained from Home could be useful to plaintiffs. The only evidence in the record is that Risjord provided no information to Home and Home none to Risjord with respect to the Multi-Piece Rim cases (A95, 171, 192).

The Firestone/Home litigation (Complaint A217-221) makes no allegation that Home has furnished information to Risjord, and Firestone suggests this only by innuendo. The issues between Home and Firestone with respect to claimed conflict can be resolved in that litigation, but suffice it to say that if Firestone had discovered that information had been provided by Home to Risjord on the Multi-Piece Rim cases, this information would have been presented to this Court.

Firestone is thus limited in its prayer for relief to those cases in which Home provided insurance which by its admission excludes Hale.

The only basis for the claim in the uninsured Hale case is the appearance of impropriety. The arguments from III H and particularly the language from the *Board of Education v. Nyquist,* 590 F.2d 1241, 1247 (2nd Cir.

1979), cited above, is appropriate. The addition of the Hale case as one in which relief is sought is actually no more than a studied pattern of an overbroad scope of the relief sought and further demonstration that Firestone's motion is essentially for tactical gain rather than because of concern with the legal ethics involved or the representation that is being provided plaintiffs. See *Allegaert v. Perot*, 565 F.2d 246, 251 (2nd Cir. 1977).

CONCLUSION

Orders denying disqualification of an attorney should not be appealable under 28 USC § 1291 because they do not meet the *Cohen* criteria. They turn on the facts of a particular case and do not involve principles of law or public interest. Normal appellate procedures are adequate to vindicate these interests and there is no irreparable injury involved. There is frequent abuse of such motions often used as a tactical weapon and as disguised harassment. There is no justification for upsetting the balance between the appellate and trial processes by granting appeals of right.

Even if the Court determines that disqualification denials are appealable, Firestone has already had its case reviewed by the Court of Appeals for the Eighth Circuit. Because two Courts have reviewed the discretionary and factual findings of this case, this Court should not re-examine these issues.

Firestone's argument ignores most of the record that supported the District Court's ruling that consents as authorized in DR5-105(C) dispel any question of the ability of Risjord to exercise his independent professional judgment on behalf of his client. Firestone is not a client of Risjord and has no standing to raise the consent issues. Since

the disposal of the *Cannova* fire case, Risjord does not represent Home, and the past representation does not give any grounds for disqualification. No true conflict exists, and Firestone's effort to achieve tactical gain should be rejected by affirmance of the District Court's order.

Respectfully submitted,

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ADDENDUM

G = appeal from an order granting a motion to disqualify counsel.

D = appeal from an order denying a motion to disqualify counsel.

First Circuit

1. G *In re Benjamin*, 582 F.2d 121 (1st Cir. 1978)

Second Circuit

1. D *Bohack Corporation v. Gulf & Western*, 607 F.2d 258 (2nd Cir. 1979)
2. D *Armstrong v. McAlpin*, 606 F.2d 28 (2nd Cir. 1979)
3. G *U.S. v. Ostrer*, 597 F.2d 337 (2nd Cir. 1979)
4. G *Board of Education v. Nyquist*, 590 F.2d 1241 (2nd Cir. 1979)
5. G *Government of India v. Cook Industries, Inc.*, 569 F.2d 737 (2nd Cir. 1978)
6. D *Fund of Funds, Ltd. v. Arthur Andersen & Co.*, 567 F.2d 225 (2nd Cir. 1977)
7. G *In re Taylor*, 567 F.2d 1183 (2nd Cir. 1977)
8. D *Allegaert v. Perot*, 565 F.2d 246 (2nd Cir. 1977)
9. G *NCK Organization, Ltd. v. Bregman*, 542 F.2d 128 (2nd Cir. 1976)
10. D *SEC v. Sloan*, 535 F.2d 679 (2nd Cir. 1976)
11. D *W. T. Grant Company v. Haines*, 531 F.2d 128 (2nd Cir. 1976)
12. G *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384 (2nd Cir. 1976)

13. G *International Electronics Corporation v. Flanzer*, 527 F.2d 1288 (2nd Cir. 1975)

14. D *Lefrak v. Arabian American Oil Company*, 527 F.2d 1136 (2nd Cir. 1975)

15. G *U.S. v. Armedo-Sarmiento*, 524 F.2d 591 (2nd Cir. 1975)

16. D *J. P. Foley & Co., Inc. v. Vanderbilt*, 523 F.2d 1357 (2nd Cir. 1975)

17. D *Silver Chrysler-Plymouth v. Chrysler Motors Corporation*, 518 F.2d 751 (2nd Cir. 1975)

18. G *Hull v. Celanese Corporation*, 513 F.2d 568 (2nd Cir. 1975)

19. D *Ceramco, Inc. v. Lee Pharmaceuticals*, 510 F.2d 268 (2nd Cir. 1975)

20. D. *General Motors Corporation v. City of New York*, 501 F.2d 639 (2nd Cir. 1974)

21. D *Silver Chrysler-Plymouth, Inc. v. Chrysler Motors Corporation*, 496 F.2d 800 (2nd Cir. 1974)

22. G *Emle Industries, Inc. v. Patentex, Inc.*, 478 F.2d 562 (2nd Cir. 1973)

23. D *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556 (2nd Cir. 1970)

24. G *Tucker v. Shaw*, 378 F.2d 304 (2nd Cir. 1967)

25. D *Katz v. Kilsheiner*, 327 F.2d 633 (2nd Cir. 1964)

26. D *U.S. v. McFaddin Express, Inc.*, 310 F.2d 799 (2nd Cir. 1962)

27. G *W. E. Basset Company v. H. C. Cook Company*, 302 F.2d 268 (2nd Cir. 1962)

28. D *Marco v. Dulles*, 268 F.2d 192 (2nd Cir. 1959)

29. D *Fleischer v. Phillips*, 264 F.2d 515 (2nd Cir. 1959)

30. D *Colonial Drive-In Theatre, Inc. v. Warner Bros. Pictures, Inc.*, 262 F.2d 856 (2nd Cir. 1959)

31. D *Harmar Drive-In Theatre v. Warner Bros. Pictures, Inc.*, 239 F.2d 555 (2nd Cir. 1956)

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33. G *Laskey Bros. of W. Va. v. Warner Bros. Pictures*, 224 F.2d 824 (2nd Cir. 1955)

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1. D *In Re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3rd Cir. 1978)

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1. G *Aetna Casualty and Surety Company v. U.S.,* 570 F.2d 1197 (4th Cir. 1978)

2. G *U.S. v. Clarkson,* 567 F.2d 270 (4th Cir. 1977)

3. G *U.S. v. Duklewski,* 567 F.2d 255 (4th Cir. 1977)

4. G *U.S. v. Barker,* 563 F.2d 652 (4th Cir. 1977)

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1. D *Church of Scientology of California v. McLean,* 615 F.2d 691 (5th Cir. 1980)

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